SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/05/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000561

FILED: _____

STATE OF ARIZONA

KATHY J LEMKE

v.

BARKEV GARO KIBARIAN II

GEORGE E MUELLER

FINANCIAL SERVICES-CCC
PEORIA JUSTICE COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PEORIA JUSTICE COURT

Cit. No. 1653970

Charge: A. DUI ALCOHOL
B. DUI OVER .10%
C. EXTREME DUI
D. CRIMINAL DAMAGE X 2
E. ENDANGERMENT X 3

DOB: 07/20/65

DOC: 05/19/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Peoria Municipal Court and the memoranda submitted by the parties.

1. Facts

This case arises out of a series of hit-and-run accidents that occurred late on the afternoon of May 19, 2000. At the last of several accident scenes, a vehicle waiting to turn left hit first the car in front of it and, shortly thereafter, the car in line behind it.[1] The drivers of the other vehicles each got out of their cars and separately approached the vehicle between them.[2] The driver who had instigated the accident did not respond to questions and appeared dazed.[3] He then left the scene, hitting a third car in the process.[4] A passer-by, William Sweeney, followed the driver to a house on Runion Street, where he saw the driver exit the vehicle and fall to his knees briefly before getting up and going inside the residence.[5] Mr. Sweeney reported the destination of the car to a 911 operator on his cell phone.[6] At least one of the witnesses also called 911.[7]

DPS Officers Say and Dapster arrived at the residence in response to Mr. Sweeney's 911 call.[8] When there was no answer at the front door, they went to the arcadia door at the rear of the residence, which was open slightly.[9] They were joined shortly[10] by Officer Nelson of the Phoenix Police, who had responded to

1 R. T. of June 13, 2001, at p. 26.
2 R. T. of June 13, 2001, at p. 27.
3 R. T. of June 13, 2001, at p. 28.
4 R. T. of June 13, 2001, at p. 29.
5 R. T. of June 13, 2001, at p. 123.
6 Id.
7 R. T. of June 13, 2001, at p. 45.
8 R. T. of June 13, 2001, at p. 100.
9 R. T. of June 13, 2001, at p. 101.
10 R. T. of June 13, 2001, at p. 103.

the collisions.[11] Officer Nelson opened the arcadia door, announced his presence, and entered the residence.[12] Officers Say and Dapster followed Officer Nelson into the residence.[13] Officers Say and Dapster went into the bedroom, where they saw clothing matching the description of the suit worn by the hit-and-run driver.[14] Appellant walked out of the closet.[15] He smelled of alcohol, was disoriented, and Officer Say had to support him in an upright position.[16] Officer Nelson noticed many pill vials in the bedroom.[17] Officer Nelson placed Appellant under arrest for the hit and run accidents.[18]

Appellant asked to speak to his attorney, and for his wallet.[19] The officers gave Appellant his wallet, but would not let him call his attorney from the residence.[20] Within a few minutes, Officer Nelson took Appellant out of the house through the garage.[21] Officer Nelson read Appellant his Miranda rights approximately seven minutes later,[22] at which time Appellant again requested an attorney.[23] Officer Say left to bring the two witnesses from the last accident scene to the house to identify Appellant.[24] Appellant passed out a few minutes later.[25]

The two witnesses arrived and positively identified Appellant.[26] Paramedics arrived shortly thereafter,[27] treated

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11 R. T. of June 13, 2001, at p. 129.
12 R. T. of June 13, 2001, at p. 103.
13 R. T. of June 13, 2001, at p. 104.
14 Id.
15 R. T. of June 13, 2001, at p. 105.
16 Id.
17 R. T. of June 13, 2001, at p. 86.
18 R. T. of June 13, 2001, at p. 134.
19 R. T. of June 13, 2001, at p. 80.
20 Id.
21 R. T. of June 13, 2001, at p. 81.
22 Id.
23 R. T. of June 13, 2001, at p. 82.
24 R. T. of June 13, 2001, at p. 110.
25 R. T. of June 13, 2001, at p. 84.
26 R. T. of June 13, 2001, at p. 32, and p. 50.

Appellant at the scene, and took him to a nearby hospital. Officer Nelson followed on his motorcycle. [28] After Officer Nelson arrived at the hospital, medical personnel began to draw Appellant's blood.[29] Officer Nelson produced his blood draw kit and asked for a sample.[30] The hospital employee drawing the blood filled extra vials for Officer Nelson.[31] Appellant stated that he refused to take a blood test until he spoke with his attorney, but Officer Nelson did not allow him to make the call at that time.[32] At some time later, while still at the hospital, Appellant's attorney called and spoke with Appellant.[33]

Appellant was charged with multiple counts of criminal damage, leaving the scene of a non-injury accident, and DUI. Appellant filed four motions to dismiss or to suppress evidence, alleging warrantless entry into his residence in violation of the Fourth Amendment to the United States Constitution, denial of his Sixth Amendment right to counsel, an unduly suggestive identification procedure, and improper blood sample collection. The trial court denied all four motions and Appellant submitted the case on the record.[34] The trial court found Appellant guilty on all counts and sentenced him to sixty days in jail less 45 days suspended if he took an alcohol class, costs, and a fine of two thousand dollars ($2,000). This appeal followed.

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[27] R. T. of June 13, 2001, at p. 62 and p. 186.
[28] R. T. of June 13, 2001, at p. 76.
[29] R.T. of June 13, 2001, at p. 74.
[30] R.T. of June 13, 2001, at p. 78.
[31] R.T. of June 13, 2001, at p. 85.
[32] R.T. of June 13, 2001, at p. 98-99.
[33] R.T. of June 13, 2001, at p. 91.
[34] R.T. of June 13, 2001, at p. 195.

2. Standard of Review

Motions to suppress evidence are reviewed to determine if the trial court was clearly erroneous.[35] The evidence must be reviewed in the light most favorable to upholding the trial court's decision.[36] However, where statutory interpretation is involved, the standard of review is *de novo* [37] In this case, the appellate court does not reweigh the evidence.[38] Instead, the evidence is reviewed in a light most favorable to affirming the lower court's ruling.[39] The reviewing court must look only at whether there was substantial evidence to support the trial court's decision.[40] Only if there were no probative facts to support the verdict can Appellant prove the evidence was insufficient for the ruling.[41]

3. Warrantless Entry

Appellant alleges that the law enforcement officials' warrantless entry into his residence was an unconstitutional search and seizure that does not fall within the medical assistance exception. Police officers may enter a residence without a warrant if they reasonably believe someone inside is in need of immediate aid or assistance.[42] Factors include reasonable grounds to believe there is an emergency, that the search is not primarily motivated by an intent to arrest or seize evidence, and a reasonable basis approaching probable cause to associate the emergency with the place to be searched.[43] Appellant does not disagree that the police officers involved

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35 State v. Clary, 196 Ariz. 610, 611-12, 2 P.3d 1255 (App. 2000).

36 Id.

37 In re Kyle M., 200 Ariz. 447, 448, 27 P.3d 804, 805 (App. 2001). See also, State v. Jensen, 193 Ariz. 105, 970 P.2d 937 (App. 1998).

38 Id.

39 State v. Fulminante, 193 Ariz. 485, 492-3, 975 P.2d 75, 82-83 (1999).

40 State v. Pittman, 118 Ariz. 71, 574 P.2d 1290 (1978).

41 State v. Carter, 118 Ariz. 562, 578 P.2d 991 (1978); State v. Barnett, 111 Ariz. 391, 531 P.2d 148 (1975).

42 State v. Fisher, 141 Ariz. 227, 237, 686 P.2d 750 (1984).

43 Id.

clearly had probable cause to associate any possible medical emergency with Appellant's residence. Rather, they claim that the police officers did not believe a real medical emergency existed and that the search was motivated primarily by an intent to arrest Appellant and seize any evidence.

Officer Say testified that upon arriving at Appellant's house he thought he was dealing with a disoriented male.[44] Similarly, Officer Nelson testified that witness reports indicated Appellant was disoriented and dazed and so he wanted to ensure Appellant did not require medical attention.[45] Officer Say stated that, in cases involving possible medical emergency, officers go to the scene and assess the situation before calling in any necessary medical units.[46]

The rule regarding the medical assistance exception explicitly states that concern for the resident's safety must be the primary concern rather than a desire to seize evidence.[47] However, medical assistance does not have to be the only concern.[48] As long as police officers reasonably believe an emergency existed to justify their entry, a secondary goal of preserving evidence and arresting suspects is valid.[49] Based upon the evidence presented at the hearing, the trial court did not clearly err in ruling that the law enforcement officials were motivated primarily by concern for Appellant's medical condition and that the warrantless entry was lawful under the medical assistance exception.

4. Right to Counsel

The accused in a DUI case has a "qualified due process right" to obtain evidence independently while it is still

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44 R.T. of June 13, 2001, at p. 102.

45 R.T. of June 13, 2001, at p. 132.

46 R.T. of June 13, 2001, at p. 113-114.

47 State v. Sharp, 193 Ariz. 414, 419, 973 P.2d 1171 (1999).

48 Id.

49 Id.

available.[50] The right to counsel during the DUI investigation is part of this right.[51] However, the access the accused has to counsel during the investigation is qualified because it is available only to the extent "the exercise of that right does not unduly delay or interfere with the law enforcement investigation."[52]

Courts have held that the right of the accused to counsel has been violated where police prevented the accused from contacting an attorney.[53] Similarly, if the police refuse to allow the accused to leave a call back number so that his attorney may contact him during the investigation, the accused's right to counsel has been violated.[54] On the other hand, the accused has a right to speak privately with his attorney, but only if this does not affect the investigation or the accuracy of the testing.[55] This case law reflects the Arizona Rules of Criminal Procedure, which give the accused the right to consult an attorney "as soon as feasible" after being taken into custody.[56]

The trial court pointed to safety concerns in denying Appellant's motion regarding right to counsel.[57] This was clearly also a concern of the officers involved.[58] The fact that Appellant passed out approximately ten minutes after the officers entered the residence could not have been anticipated.[59] Subsequently, Appellant either unconscious or being tended to by

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50 See, Kunzler v. Pima County Superior Court, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); State v. Holland, 147 Ariz. 453, 711 P.2d 602 (1985); State ex rel. Webb v. City Court, 25 Ariz. App. 214, 216, 542 P.2d 407, 408 (1975).

51 State v. Transon, 186 Ariz. 482, 485; 924 P.2d 486, 489 (App. 1996).

52 See, State v. Sanders, 194 Ariz. 156, 157, 978 P.2d 133, 134 (1998); McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

53 State v. Keyonnie, 181 Ariz. 485, 486, 892 P.2d 205, 206 (1995).

54 State v. Sanders, supra.

55 State v. Holland, supra

56 Ariz. R. Crim Proc. 6.1(a) (emphasis added).

57 R.T. of June 13, 2001, at p. 187.

58 R.T. of June 13, 2001, at p. 89.

59 R.T. of June 13, 2001, at p. 135.

paramedics and medical personnel. It was not clearly erroneous for the trial court to rule that the telephone call to Appellant from his attorney was the first time he could feasibly consult an attorney without risking officer safety or his own medical treatment.

5. Witness Identification

Appellant alleges that the trial court erred in allowing testimony from witnesses who positively identified Appellant because the circumstances surrounding those identifications were unnecessarily suggestive. There are five factors to consider in determining whether an identification was unduly suggestive: (1) the amount of interaction at the first meeting, (2) how attentive the witness was at the scene of the first meeting, (3) whether the description provided is generic or specific, (4) how certain the witness is of identifying the suspect suggested, and (5) whether law enforcement officers rushed the witness to identify the suspect.[60]

Each of the two witnesses interacted with Appellant for several minutes after the hit-and-run accident.[61] They stood within a few feet of Appellant's car[62] and appear to have examined Appellant and his actions with some care.[63] Each witness stated he was one hundred percent certain that Appellant was the driver who had hit his car.[64] Officer Say allowed the witnesses to approach Appellant when they reached his residence and to take their time identifying him.[65] The witnesses testified that the officers did not impact their identification.[66] These witnesses do not appear to have provided any description to law enforcement officials, either generic or

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60 State v. Hoskins, 199 Ariz. 138, 14 P.3d 127 (2000).
61 R.T. of June 13, 2001, at p. 28 and p. 42.
62 R.T. of June 13, 2001, at p. 30 and p. 40.
63 See, e.g., R.T. of June 13, 2001, at p. 36.
64 R.T. of June 13, 2001, at p. 33 and p. 50.
65 R.T. of June 13, 2001, at p. 32 and p. 48.
66 R.T. of June 13, 2001, at p. 49.

descriptive, as the only description on the record came from a third witness not taken to identify Appellant.[67] However, given the manner in which events transpired, the lack of this factor is not fatal. An objective observer could reasonably assume that the manner in which the witnesses identified Appellant was not unduly suggestive. The trial court did not err in denying Appellant's motion regarding witness identification.

6. Blood Sample Collection

The trial court held that the blood drawn for Officer Nelson and ultimately tested for alcohol concentration fell within the medical exception of A.R.S. § 28-1388(E). This statute reads, in part, that

> [n]otwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated section 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

This exception is applicable where (1) there is probable cause that the person has been driving under the influence, (2) there are exigent circumstances, and (3) the blood is drawn by medical personnel and for medical purposes.[68] Appellant alleges that the drawing of his blood fails both the second and third requirements of this test.

a. Exigent Circumstances.

Arizona courts, following the United States Supreme Court, have long held that exigent circumstances exist for drawing blood samples in DUI cases without a warrant due to the

[67] R.T. of June 13, 2001, at p. 129-130.
[68] State v. Cocio, 147 Ariz. 277, 284, 709 P.2d 1336 (1985).

"evanescent nature of alcohol" in the blood.[69] Appellant alleges that there were no exigent circumstances here because police officers are now able to obtain warrants for blood tests in under an hour, before the alcohol has left the bloodstream. Appellants also state that the blood draw was a warrantless seizure because Officer Nelson subjectively believed that the blood would not dissipate in the time it would take to obtain a warrant.[70]

Appellant relies on the Arizona Court of Appeal's holding in State v. Flannigan for the proposition that there are not exigent circumstances when law enforcement officials reasonably believed they have sufficient time to obtain a warrant.[71] However, Appellants admit that Flannigan does not involve the medical exception statute. In Cocio, exigent circumstances under the medical exception statute were found where there is probable cause, limited intrusion, and ready destructibility of the evidence.[72] Appellant does not argue that probable cause for the blood draw did not exist. Cocio held that there is no additional intrusion when there is no additional needle puncture.[73] That is the case here, so the intrusion was limited. This leaves only the destructibility of the evidence.

Appellants claim that Cocio's holding was predicated upon a theory of the "evanescent nature of alcohol" in the blood, which is now known to be medically unsound. However, this holding by the Arizona Supreme Court has not yet been overturned. As the Court of Appeals has noted, "[b]ecause we are bound by our supreme court's determinations, we decline to address this argument."[74] The blood draw meets the exigent circumstances requirement.

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69 Id. See also, Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835 (1966); State v. Flannigan, 194 Ariz. 150, 153, 978 P.2d 127 (App. 1998).

70 Appellant's Memorandum at p. 23.

71 State v. Flanagan, supra.

72 State v. Cocio, supra.

73 Id. at 286-87.

74 Lind v. Arizona, 191 Ariz. 233, 237, 954 P.2d 1058, 1062 (1998).

b. Draw by Medical Personnel

Appellant alleges that Officer Nelson controlled the blood draw, thus rendering the draw not under the control of medical personnel. However, Appellant agrees that Officer Nelson did not instigate the blood draw.[75] ARS § 28-1388(E) does not require that medical personnel control every aspect of the blood draw. Rather, the statute states only that the draw must be performed by medical personnel for medical purposes. This was clearly the case here.

Based upon these facts, there was sufficient evidence for the trial court to find that the blood draw was lawful.

IT IS THEREFORE ORDERED affirming the judgment of the Peoria Municipal Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Peoria Municipal Court for all further and future proceedings.

[75] Appellant's Memorandum at p. 24.